United States Court of Appeals

for the Second Circuit

RESPONDENT'S BRIEF

75-4224

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 75-4224

AMERICAN STEVEDORES, INC.

and

MICHIGAN MUTUAL LIABILITY INSURANCE COMPANY

Petitioners

v.

VINCENT SALZANO

and

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR

Respondents

ON PETITION FOR REVIEW OF AN ORDER
OF THE BENEFITS REVIEW BOARD

BRIEF FOR RESPONDENT DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS

WILLIAM J. KILBERG
Solicitor of Labor

LAURIE M. STREETER
Associate Solicitor

FRANCINE K. WEISS
Attorney
U.S. Department of Labor
200 Constitution Avenue, N.W.
Washington, D.C. 20210
202-523-7630

Attorneys for Director, Office
of Workers' Compensation Programs

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Longshoremen's and Harbor Workers' Compensation Act Amendments of 1972, Pub. L. 92-576, 86 Stat. 1261

MISCELLANEOUS

COUNTERSTATEMENT OF THE QUESTIONS PRESENTED

I. Whether the Benefits Review Board's reversal of the decision and order of the administrative law judge is in accordance with the law.

II. Whether section 10(h)(1)-(3) of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 910(h)(1)-(3), is constitutional.

COUNTERSTATEMENT OF THE CASE

This is a proceeding for review of an order of the Benefits Review Board,[1/] United States Department of Labor, reversing the decision and order of an administrative law judge in the case entitled Salzano v. American Stevedores, Inc., et al., 2 BRBS[2/] 178 (1975), pursuant to section 21(c) of the Longshoremen's and Harbor Workers' Compensation Act,[3/] 33 U.S.C. § 921(c) (Supp. III, 1973).

1/The Board was created pursuant to § 15(a) of the Longshoremen's and Harbor Workers' Compensation Act Amendments of 1972, Pub. L. 92-576, 86 Stat. 1251, 1261. The Board has jurisdiction over appeals from compensation orders issued by administrative law judges pursuant to the Act.

2/"BRBS" refers to the Benefits Review Board Service, a publication of the Matthew Bender and Company, Inc., which contains the actual text of opinions and decisions issued by the Benefits Review Board.

3/Act of March 4, 1927, c.509, 44 Stat. 1424, as amended, 33 U.S.C. § 901 et seq.

The claimant, Vincent Salzano, filed a timely request for the modification of a compensation order issued in May, 1967, pursuant to section 22 of the Longshoremen's Act, 33 U.S.C. § 922 (Supp. III, 1973). The claimant alleged that he was permanently totally disabled. The employer and its compensation insurance carrier[4/] controverted this claim.

A formal administrative hearing was held pursuant to section 19(d) of the Act, 33 U.S.C. 919(d) (Supp. III, 1973). Following this hearing, the administrative law judge issued a compensation order denying claimant's request for modification of the award; the administrative law judge held that the record evidence did not support the claim of permanent total disability.

The claimant[5/] and the Director, Office of Workers' Compensation Programs,[6/] filed timely appeals from this decision with the Benefits Review Board, pursuant to section 21(b), 33 U.S.C. § 921(b) (Supp. III, 1973). The claimant and the Director

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4/The employer and carrier hereinafter will be jointly referred to as the employer.

5/BRB No. 74-223.

6/BRB No. 74-223A. The Rules and Regulations of the Benefits Review Board provide that the Director, Office of Workers' Compensation Programs, is a party to all of its proceedings and may appeal decisions of an administrative law judge to the Board. See, 20 CFR § 801.2(a)(10); 20 CFR § 802.201 (1975); see also, 20 CFR § 702.333(b) (1975).

argued that the decision of the administrative law judge was not supported by the record evidence and was contrary to law. The employer sought affirmance of the decision of the administrative law judge. Moreover, the employer alleged that the 1972 amendments[7] to the Act, which increased compensation for permanent total disability for pre-amendment injuries, said increases payable from the Special Fund, were unconstitutional.[8]

By order filed August 20, 1975, the Benefits Review Board reversed the decision of the administrative law judge. The Board held that disability, within the meaning of the Act, is not solely a medical question but is also an economic concept. That the undisputed evidence is that claimant is still disabled and that the decision of the administrative law judge is erroneous, as a matter of law, because the employer failed to meet its burden

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7/Section 11, Longshoremen's and Harbor Workers' Compensation Act Amendments of 1972, Pub. L. 92-576, 86 Stat. 1251, 1258, 33 U.S.C. §§ 910(h)(1)-(3) (Supp. III, 1973).

8/The employer raised this issue at the formal hearing. However, these sections are applicable only in cases of permanent total disability or death; the denial of claimant's request obviated the need to pass upon this question. Moreover, the administrative law judge further noted that administrative proceedings were not the proper forum to pass upon the constitutionality of acts of Congress (App. 9a).

of proving that suitable gainful employment is available to the claimant in view of his medical condition, his age, education and work experience. The Board refused to pass upon the constitutional issue raised by the employer on the ground that the employer did not seek review of those issues by filing a notice of appeal.

COUNTERSTATEMENT OF THE FACTS

On January 3, 1966, Vincent Salzano suffered an acute posterior lateral myocardial infarction in the course of his employment. Thereafter, on April 18, 1966, the claimant sustained an extension of this myocardial infarction. A claim for compensation was filed in accordance with section 13 of the Act, 33 U.S.C. § 913. The employer controverted the claim. Following a hearing on the claim, the deputy commissioner issued a compensation order in favor of the claimant finding the claimant's injury causually related to his employment and awarding compensation for temporary total disability (S.A. 1-6).[9/]

9/S.A. refers to the supplemental appendix submitted herein by leave of court.

The employer subsequently filed requests for modification of the order of the deputy commissioner; each request was denied. In July, 1972, the employer ceased compensation payments on the ground that it had paid claimant the statutory maximum for an injury causing less than permanent total disability or death. See, 33 U.S.C. 914(m) (1970 ed.).

The claimant has not been able to return to his former employment nor has he been regularly employed since the 1966 injury. Following the termination of compensation claimant filed a request for modification of the original award on the ground that his disability was permanent and total.[10/]

ARGUMENT

I

THE BENEFITS REVIEW BOARD CORRECTLY REVERSED THE DECISION OF THE ADMINISTRATIVE LAW JUDGE ON THE GROUND THAT THE DECISION WAS CONTRARY TO THE EVIDENCE AND ERRONEOUS AS A MATTER OF LAW.

In his Decision and Order, the administrative law judge held:

> * * * from the entire record in this matter if there has been a 'change in conditions' it has been for the better, that the

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10/Prior to the termination of compensation, there was no need for the claimant to secure the services of an attorney in order to have the original award modified. Claimant was receiving the then weekly maximum amount of compensation regardless of whether his disability were classified temporary total or permanent total; the relevancy of the distinction between these two classes of disability only came into being when the statutory maximum had been paid. See 33 U.S.C. §§ 906, 908(a)-(b), 914(m) (1970 ed.).

> Claimant is not permanently totally disabled as a result of his injury of January 3, 1966, and that modification of the May 31, 1967 Compensation Award should be denied.
>
> (App. 9a).

The Benefits Review Board reversed this denial for modification on the ground that the medical experts only

> [D]isagree as to the extent of claimant's disability, both agree that claimant has suffered a disability as a result of the 1966 heart attack which prevents him from returning to work as a marine carpenter. Once it is established that an employee is disabled from his regular employment, the burden is on the employer to come foreward with evidence that the employee has actual opportunities to obtain other suitable employment.
>
> (App. 16a).

Accordingly, the Board held the administrative law judge erred as a matter of law by his failure to apply the standard and the employer's failure to meet its burden.

The Longshoremen's Act contains a rebuttable presumption that a claim comes within the Act:

> In any proceeding for the enforcement of a claim for compensation under this Act, it shall be presumed in the absence of substantial evidence of the contrary
>
> (a) That the claim comes within the provisions of the Act.
>
> 33 U.S.C. § 920(a) (Supp. III, 1973).

In essence, the employer's burden therefore is first to rebut this presumption with substantial countervailing evidence, Del Vecchio v. Bowers, 296 U.S. 280, 286 (1935).

In this case, the employer's burden was to present substantial evidence countering the presumed causal relationship between Mr. Salzano's accident and a disability. Swinton v. J. Frank Kelly, Inc., et al., --- F.2d ---, No. 74-1164 (D.C. Cir. February 3, 1976). To dispel this presumption, specific and comprehensive evidence was necessary to demonstrate that the cause of his disability was unrelated to any effects of his employment related injury.

Dr. Reich, who testified on behalf of the employer, examined the claimant on July 1, 1966, June 12, 1970, April 17, 1972, and May 11, 1973. On these occasions he noted that claimant has a "mild partial disability as a result of the heart attack on 1/3/66," claimant's EKG's revealed residuals of the infarction and he experienced premature ventricular contraction (extra heartbeats) and psycho-genic and musculo-skeltal deterioration.

Dr. Shub, who testified on behalf of the claimant, examined the claimant on October 7, 1966 and found a myocardial infarction associated with a severe anginal syndrome due to coronary insufficiency and severe impairment of cardiac function and efficiency. Dr. Shub's medical report of June 2, 1972, found claimant permanently totally disabled; his "Supplemental Report" of August 30, 1972, attributed claimant's total disability to his heart condition. Thus, both the employer's and claimant's medical experts agreed that the claimant has a disability directly related to his employment injury. The fact that they attribute some of claimant's chest pains to arteriosclerosis did not change or alter their conclusion that there is a disability related to the employment injury.

Doctors Shub and Reich did disagree as to whether a myocardial infarction can advance arterioclerosis. Thus, all of claimant's symptoms were attributed to both conditions. However, there was uncontradicted evidence of the continuing effect of the myocardial infarction and agreement that claimant's disability was related to the infarction.

The administrative law judge, however, concluded that claimant was not permanently totally disabled. In reaching this decision, the administrative law judge discussed only the effects of the arteriosclerosis, even though the medical experts

disagreed as to its probable effect on the claimant. We respectfully submit the record evidence relative to the effects of the arteriosclerosis is, at best, uncertain and open to serious doubt, and thus, the employer has failed to present specific and comprehensive evidence to rebut the statutory presumption. See, Wheatley v. Adler, 407 F.2d 307 (D.C. Cir. 1968); Swinton, supra. Moreover, in view of the doubts raised by the conflicting medical evidence relative to the arteriosclerosis, it was incumbent upon the administrative law judge to resolve these doubts in favor of the claimant. See, Friend v. Britton, 220 F.2d 820 (D.C. Cir.), cert. denied, 350 U.S. 836 (1955).

The decision of the Benefits Review Board, reversing the decision of the administrative law judge is, moreover, in accordance with law. Dr. Reich, while testifying on behalf of the employer, concluded that the claimant was partially disabled as a result of the employment injury. Dr. Shub not only agreed that the claimant is disabled, he concluded that the disability was permanent and total.

The order of the Benefits Review Board, reversing the decision of the administrative law judge, is in accordance with law. Doctors Reich and Shub agreed that the claimant has a causally related disability; they disagreed only as to the extent of the disability. Not only did the administrative law judge fail to resolve doubts in favor of the claimant, he erred as a matter of law. Disability under the Act is an economic concept and is not limited to merely physical consequences of the injury. The Act defines disability to mean:

> [I]ncapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment.
>
> 33 U.S.C. § 902(10) (Supp. III, 1973).

In its order reversing the decision of the administrative law judge, the Board concluded:

> [B]oth [doctors] agree that claimant has suffered a disability as a result of the 1966 heart attack which prevents him from returning to his former occupation as a marine carpenter. Once it is established that an employee is disabled from his regular employment, the burden is on the employer to come forward with evidence that the employee has actual opportunities to obtain other suitable employment.
>
> (App. at 16a).

See also, Perini Corp. v. Heyde, 306 F. Supp. 1321 (D.R.I. 1969).

The employer herein fails to address this question in its brief. Moreover, the record is devoid of any evidence tending to show that such opportunities for employment are in fact available to the employer. At most the employer's expert witness testified that the claimant can do "light sedentary work." There is, however, no record evidence proving the existence or availability of "light sedentary work." Considering the age, education and work history of the claimant, the availability of any work is questionable. Indeed, one of the witnesses called by the employer testified that although he knows the claimant he would not employ him due to his heart condition.

We respectfully submit that once a disability has been established, the shifting of the burden to the employer to present evidence tending to prove the availability of employment is not unreasonable. Certainly, if a claimant were employable, it would be to the advantage of an employer to rehire him, whether in the same or different capacity. Moreover, the inclusion of the statutory presumption that a claim is compensable suggests a congressional intent that the existence of a disability - economic loss - entitles a claimant to compensation unless the employer presents evidence rebutting the loss. Proof that there is no disability is best shown by proof of the availability of employment. Therefore, the burden of showing employability best rests with the employer.

The employer ignores the Board's conclusion that an employer has the burden of proving the availability of employment to a disabled claimant. Instead, the employer suggests that the claimant was "employed for three months" and further had such a fact been known, claimant's own physician would have altered his opinion relative to claimant's disability.

Dr. Shub did testify that had he known that the claimant had been employed in 1972 he might have altered his opinion. There is no evidence, however, that the claimant was employed in 1972 at the time Dr. Shub last examined him. Indeed, Dr. Shub's later statement was in response to a hypothetical question which also did not fully restate the factual evidence. In Mitchell v. Woodworth, 449 F.2d 1097 (D.C. Cir. 1971), the court reversed the denial of compensation on the ground that the denial relied upon a medical opinion which was given in response to a hypothetical question which omitted such necessary facts as the effort and strength required to perform the suggested task.

In the instant case, the employer presented a hypothetical question where the factual events did not correspond to the record evidence. The employer herein suggested that the claimant was employed in a lumber yard. However, the evidence establishes that the claimant was not "employed" but rather spent some time at a lumber yard because of his friendship with some of the employees. The "employment" which the employer referred to in his question to Dr. Shub constituted nothing more than occasionally sweeping a floor and doing a few other menial chores. Clearly, a hypothetical question suggesting that claimant performed strenuous tasks in a lumber yard does not properly present all of the necessary facts to warrant reliance on Dr. Shub's response. Equally significant, the employer, in posing this hypothetical question failed to advise Dr. Shub that the alleged employment took place at least one year prior to the examination of the claimant from which he had concluded claimant was permanently totally disabled, and, such "employment" only occurred on an irregular basis over the period of three months.

II

THE ENACTMENT OF SECTIONS 10(h)(1)-(3), 33 U.S.C. § 910(h)(1)-(3) IS A VALID EXERCISE OF CONGRESS' POWERS AND IS NOT UNCONSTITUTIONAL.

A. The Constitutional issue is properly before the Court.

The Benefits Review Board declined to pass upon the constitutionality of sections 10(h)(1)-(3) of the Act, 33 U.S.C. § 910(h)(1)-(3) (Supp. III, 1973), on the ground that the employer failed to file a notice of appeal seeking resolution of this issue. While disagreeing with the employer's assertion of unconstitutionality, we respectfully submit that the employer timely raised this issue at the formal hearing. The administrative law judge, however, concluded that his decision denying modification rendered moot the constitutional question. Additionally, we submit, the administrative law judge correctly concluded that an administrative hearing is not a proper forum to pass upon the constitutionality of an Act of Congress (App. 9a).

Moreover, the Board's refusal to pass upon this issue does not preclude review by this Court. We respectfully submit that the conclusion of the administrative law judge that he lacks authority to pass upon constitutional issues is equally applicable to the Benefits Review Board.

That Acts of Congress may be declared inoperative because of their repugnance to the Constitution was established in Marbury v. Madison, 1 Cranch 137 (1803). Chief Justice Marshall referred to the function of so declaring as "emphatically the province and duty of the judicial department." Id. at 177. This reference, rooted in the organic constitutional considerations discussed in Marbury, was expanded in Panitz v. District of Columbia, 112 F.2d 39 (D.C. Cir. 1940):

> * * * the necessities of our system require the judiciary to determine the constitutionality of Acts of the legislature. There can be little doubt that it represents the highest exercise of judicial power, and one that even the judiciary is reluctant to exercise. Interruption of the machinery of government necessarily attendant on this function not only cautions the judiciary but argues as well against its exercise by other agencies. It is this consideration for the orderly, efficient functioning of the processes of government which makes it impossible to recognize in administrative officers any inherent power to nullify legislative enactments because of personal belief that they contravene the constitution. * * * [I]t has been held that an administrative agency invested with discretion has no jurisdiction to entertain constitutional questions where no provision has been made therefor. * * * Here again is apparent a reluctance to invest non-judicial agencies with jurisdiction to rule on the validity of statutes.
>
> 112 F.2d at 41-42.

Accord, Engineers Public Service Co. v. S.E.C., 138 F.2d 936, 925-53 (D.C. Cir. 1943), vacated as moot, 332 U.S. 788 U.S. (1947).

The Benefits Review Board is, of course, a quasi-judicial body, created by Congress to review compensation orders pursuant to the Longshoremen's Act. See, 20 CFR § 801.103 (1975). The Board is, however, within the Department of Labor and as such is within the executive branch. The province of an executive quasi-judicial tribunal does not extend to a determination of the constitutionality of an Act of Congress. As has been stated by other courts, "no administrative officer or board * * * could do otherwise than assume the validity of the law * * * which he is called upon to administer." Buder v. First National Bank, 16 F.2d 990, 993 (8th Cir.), cert. denied, 247 U.S. 743 (1927); Southern Boulevard R. Co. v. City of New York, 86 F.2d 633, 635 (2d Cir. 1936). Indeed, in Oestereich v. Selective Service Board, 393 U.S. 233, 242 (1969), Justice Harlan, in a concurring opinion stated: "Adjudication of the constitutionality of congressional enactments has generally been thought beyond the jurisdiction of administrative agencies." See also Downen v. Warner, 481 F.2d 642 (9th Cir. 1973); Murray v. Vaughn, 300 F. Supp. 688 (D.R.I. 1969).

We submit that the Board's refusal to pass upon the constitutional issue is harmless and does not preclude a decision by this Court since, as previously noted, the employer raised this issue timely before the administrative law judge.

B. Sections 10(h)(1) and (3) of the amended Act are constitutional.

The challenged provisions of the amended Longshoremen's Act provides:

33 U.S.C. § 910(h)

> (1) Not later than ninety days after the date of enactment of this subsection, the compensation to which an employee or his survivor is entitled due to total permanent disability or death which commenced or occurred prior to enactment of this subsection shall be adjusted. The amount of such adjustment shall be determined in accordance with regulations of the Secretary by designating as the employee's average weekly wage the applicable national average weekly wage determined under section 6(b) and (A) computing the compensation to which such employee or survivor would be entitled if the disabling injury or death had occurred on the day following such enactment date and (B) subtracting therefrom the compensation to which such employee or survivor was entitled on such enactment date; except that no such employee or survivor shall receive total compensation amounting to less than that to which he was entitled on such enactment date. Notwithstanding the foregoing sentence, where such an employee or his survivor was awarded compensation as the result of death or permanent total disability at less than the maximum rate that was provided in this Act at the time of the injury which resulted in the death or disability, then his average weekly wage shall be determined by increasing his average weekly wage at the time of such injury by the percentage which the applicable national average weekly wage has increased between the year in which the injury occurred and the first day of the first month following the enactment of this section. Where such injury occurred prior to 1947, the Secretary shall determine, on the basis of such economic data as he deems relevant, the amount by which the employee's average weekly wage shall be increased for the pre-1947 period.

* * * * *

> (3) For the purposes of subsections (f) and (g) an injury which resulted in permanent total disability or death which occurred prior to the date of enactment of this subsection shall be considered to have occurred on the day following such enactment date.

These sections increase the compensation payable for permanent total disability and death when the compensable injury occurred prior to the effective date of the 1972 Amendments. The source of this additional compensation is provided for in section 10(h)(2) of the amended Act, 33 U.S.C. § 910(h)(2) (Supp. III, 1973):

> (2) Fifty per centum of any additional compensation or death benefit paid as a result of the adjustment required by paragraphs (1) and (3) of this subsection shall be paid out of the special fund established under section 44 of this Act, and 50 per centum shall be paid from appropriations.

The Special Fund, from which one half of the increased compensation is payable, was created pursuant to section 44 of the Act, 33 U.S.C. § 944.[11/] In order to improve upon the Fund's financing, Congress amended section 44, 33 U.S.C. § 944, which provides in relevant part:

11/The Special Fund is also known as the Second-Injury Fund (Pet. Br. at 11).

> At the beginning of each calendar year the Secretary shall estimate the probable expenses of the fund during that calendar year and each carrier or self-insurer shall make payments into the fund on a prorated assessment by the Secretary in the proportion that the total compensation and medical payments made on risks covered by this Act by each carrier and self-insurer bears to the total of such payments made by all carriers and self-insurers under the Act in the prior calendar year in accordance with a formula and schedule to be determined from time to time by the Secretary to maintain adequate reserve in the fund.
>
> Amendments, § 8(b), 86 Stat. 1251, 1256 33 U.S.C. § 944(c)(2) (Supp. III, 1973).

The employer contends that Congress may not constitutionally authorize any increase in the compensation payable for certain pre-amendment injuries.

In its brief, the employer does not challenge Congress' authority to include a provision directing the Secretary of Labor to make an annual assessment on the industry pursuant to section 44(c)(2), 33 U.S.C. § 944(c)(2) (Supp. III, 1973). Rather, the employer's argument challenges only that use of the Special Fund which increases compensation for certain pre-amendment injuries. We respectfully submit that not only has the employer failed in its substantial burden of demonstrating that the

challenged provisions are unconstitutional, its arguments fail to consider the Act as a whole and more particularly that the Special Fund itself only pays fifty percent of the adjustments authorized pursuant to section 10(h), that assessments pursuant to section 44(c)(2) are not the Fund's only source of funding, and, the compensation payable pursuant to section 10(h) is not the only use of the Special Fund.

The Special Fund's financing is from three sources: by the payment of $5,000 into the Fund in the event of a compensable death for which there are no eligible statutory survivors,[12] annual assessments,[13] and the deposit into the Fund of all sums collected as fines and penalties authorized by the Act.[14] Moreover, the Special Fund is used not only to pay adjustments authorized by section 10(h) of the Act, but also: to pay compensation pursuant to section 8(f), 33 U.S.C. § 908(f), whenever a compensable injury combines with a previous disability and the later injury is not the sole cause of the claimant's disability;[15]

12/ 33 U.S.C. § 944(c)(1) (Supp. III, 1973).

13/ 33 U.S.C. § 944(c)(2) (Supp. III, 1973).

14/ 33 U.S.C. § 944(c)(3) (Supp. III, 1973).

15/ 33 U.S.C. § 944(j)(2) (Supp. III, 1973).

to provide maintenance for employees undergoing vocational rehabilitation pursuant to section 8(g), 33 U.S.C. 908(g);[16] to provide compensation pursuant to 33 U.S.C. § 918(b) when the compensation may not otherwise be paid because of the employer's insolvency;[17] to pay the administrative expenses authorized pursuant to section 39(c), 33 U.S.C. § 939(c);[18] to repay the sums appropriated to the Special Fund;[19] to defray the cost of impartial medical examinations authorized pursuant to section 7, 33 U.S.C. § 907.[20]

Prior to the 1972 Amendments the Special Fund's sources were uncertain. Its liability pursuant to section 8(f), 33 U.S.C. § 908(f), is limited to the extent of the monies on deposit in the Fund. 33 U.S.C. § 944(g) (Supp. III, 1973). Indeed, prior to the statutory authority to assess self-insured employers and carriers the Special Fund's account was continuously low. Cf. Ruggiero v. Rederiet M/S Marion, 308 F. Supp. 798 (S.D.N.Y. 1970). Thus, in 1972 Congress elected to provide a

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16/Id.

17/Id.

18/Id.

19/33 U.S.C. § 944(j)(3) (Supp. III, 1973).

20/33 U.S.C. § 944(j)(4) (Supp. III, 1973).

means of maintaining the Fund at an adequate level by imposing this cost on the industry as a whole. Thus, the annual assessments imposed on the industry are used only partially to provide the adjustments authorized by section 10(h) of the Act.

The use of any part of the annual assessments to provide increased compensation, moreover, is not unconstitutional. There can be no doubt that section 10(h) is, in effect, retrospective: increasing compensation for certain pre-amendment injuries. However, contrary to the suggestion of the employer, retroactivity is not per se unconstitutional. In Curtis v. Whitney, 80 U.S. 68, 70 (1871) the Court noted, "that a statute is not void because it is retrospective has been repeatedly held by this court * * *." In Blount v. Windley, 95 U.S. 173 (1877), the Court reaffirmed this view:

> [t]here is no constitutional inhibition against retrospective laws. Though generally distrusted, they are often beneficial, and sometimes necessary. Where they violate no provision of the Constitution of the United States, there exists no power in the Court to declare them void.
>
> 96 U.S. at 180.

The only provisions of the Constitution which are available to condemn a retroactive statute are the due process clause and the contract clause.

The contract clause is not readily applicable to the instant situation because it is directed to the states and not to the Federal government. Thus, in New York v. U.S., 257 U.S. 591 (1921), the Court held "that neither the Congress nor the United States is in terms restricted by the provision of the Constitution Art. 1, § 10, that no state shall pass a law impairing the obligations of contracts. 257 U.S. at 593. While Congress is not bound per se by the contract clause, the Court will apply the due process standard to any Act affecting contracts. Thus, in Norman v. B. & O. R. Co., 294 U.S. 240 (1935), the Court upheld an Act of Congress requiring all private obligations to be paid in paper money and not in gold. The Court acknowledged that the effect of this Act would frustrate and may even render fruitless existing contracts. The Court, however, noted "that so long as Congress has the authority to regulate or pass laws * * * the Court may only inquire as to whether such action is arbitrary or capricious, whether such action has a reasonable relation to a legitimate end." 294 U.S. at 311.

In the instant case, the employer has not alleged that a vested right which it has acquired has been impaired. Rather, it bases its argument on the premise that payment of the increased compensation constitutes the taking of private property without just compensation. As previously noted, the cost of these increases is from a Fund which is not solely dependent upon assessments. Moreover, the annual assessment pursuant to the Act is not used solely to pay the additional compensation.

Moreover, it is a fundamental principle that workers' compensation statutes, such as the Longshoremen's Act, are designed to shift the cost of employment injuries on the industry and ultimately upon consumers as part of the cost of production. Thus, the costs incurred in providing this limited increase in compensation is not borne by an individual employer but pursuant to the over-all design of the Act, it is an indirect cost on the industry and thence on the consumer. And, in Price v. All American Engineering, 320 A. 2d 336 (Del. 1974), the Delaware Supreme Court upheld the constitutionality of a similar statutory scheme which increased compensation for certain pre-amendment injuries; part of the increase to be financed by annual assessments on the industry. The court in Price concluded that the shifting of this cost on the industry was not violative of due process.

installments from May 23, 1967 at $70.00 a week during the continuance of such

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the order of the Benefits Review Board, reversing the decision of the administrative law judge should be affirmed, and, it is further submitted that the amended Act which increases the compensation payable for certain pre-amendment injuries is constitutional.

William J. Kilberg
WILLIAM J. KILBERG
Solicitor of Labor

Laurie M. Streeter
LAURIE M. STREETER
Associate Solicitor

Francine K. Weiss
FRANCINE K. WEISS
Attorney
U.S. Department of Labor
200 Constitution Avenue, N.W.
Suite N-2716
Washington, D.C. 20210
202-523-7630

Attorneys for Director, Office
of Workers' Compensation Programs

JUDGE BOWEN: Will you read the statement to yourself and refresh your recollection?

THE WITNESS (Reading): Well, I guess it is like I said -- that a period of three months on and off, but like if you are telling me 1970, and the months, I couldn't tell you.

BY MR. DICONZENZO:

Q You say in your statement, sir, and perhaps this may refresh your recollection, that this was during the year of 1971.

A Okay. 1971, but I don't recall what months to 1971.

Q I didn't ask you that, sir.

What time of the day would he come to your residence?

A He could pop up at ten, eleven, twelve, anytime of the day.

Q How long would he remain there?

A In the course of the day, a few hours.

He would not remain but, you know, and he would be around the neighborhood and he'd be in the candy store or around the corner for coffee, you know.

Q From time to time, did he assist you or your men?

A Well, I would say, like he swept the floor every now and then --

It wasn't something -- I think for lack of something to do he would pick up a broom and sweep the floor or put some

rulers away or hang up some screws, you know.

Q Now, sir, can you tell us whether or not you paid him?

A No.

I never paid him.

Q Did you carry him on your payroll?

A Never. No, sir.

Q Did he owe you any money?

A From time to time he borrowed a ten-dollar bill, a twenty-dollar bill.

Q Did he pay you or work it off?

A No, he never worked it off.

He grift me both.

MR. MACDONALD: I am through.

JUDGE MACNEIL: All right.

CROSS-EXAMINATION

BY MR. GUCCIARDO:

Q Mr. Napolitano, are you personally a friend of Mr. Saizano?

A We became friends after arrive, sure.

Q Was he, in fact, a friend of one of your employees?

A I met him through a my friends who he was a close friend of.

Q Did he originally come to hang around your place to see the fights?

A Because of the fights, yes, and not for me.

Q During this period that you mention, three months, were there fixed hours that he came?

A No, sir, never.

Q Were there fixed days that he came?

A I can't say that there was, no.

Q Did you oblige him to come?

A No, sir.

Q Did you say, "Look, I want you here," did you say that?

A No, sir. No, sir.

Q Do you have other people hanging around there?

A Sure, we do.

As a matter of fact, I happen to have two people doing me a favor so I can come down here.

Q And not in your employ?

A No, but they are helping me out today.

Q Is it the kind of place like a candy store and you go there to shoot the breeze?

MR. DICONSTANZO: I object to the form.

THE WITNESS: No, I would not say that.

JUDGE McGRATH: Just a moment, please.

MR. DICONSTANZO: I cannot understand how a candy store would be similar to the lumber yard.

JUDGE McGRATH: Mr. [illegible] is using a figure of speech to indicate the type of meeting rather than the business.

Objection is overruled.

Go ahead.

BY MR. GUCCIARDO:

Q Do you permit friends of your employees to come around and hang around and stay for an hour or two during the course of the day?

A Not on a big scale.

If it happens to be a very close foreman, like this particular man was, and if one of his friends come around, I'm not going to offend him and say that his friend cannot hang around, but I do not condone something like that where anybody can come in and hang around.

Q You said you had a couple of people there this morning.

A They are friends of mine.

I met them through business.

Q Are these couple of people there this morning people who also hang around your place?

A When they have nothing better to do, they come and shoot the breeze with me, yes.

Q Are you aware of the fact that Mr. Balzano had a heart condition?

A That's when I first met him, and I knew he had a heart condition.

Q Did you ever see him take any medication in your

times?

A A few times.

I know he had pills with him all the time.

Q What would he do with the pills?

Do you know how he took them?

A I don't know. Put them in his mouth.

Q Were there times when, following the taking of these pills, that he would make complaints of pain in the chest and leave the premises?

A I can't say that.

I know he has been there a few times when he has not been feeling good and he would be complaining, and I remember one time he said that he can go at any minute because that is how I know he had this heart condition.

MR. DICONSTANZO: I object to the answer and move it be stricken.

It is not responsive.

JUDGE McGRATH: Objection overruled.

He is being asked of his own knowledge if he ever witnessed any of these deficiencies that Mr. Cucciardo is asking him about.

BY MR. CUCCIARDO:

Q Would you hire this man to do anything?

A How could I?

MR. DICONSTANZO: I object to the question as being

extension of that original infarction at the time.

Subsequent to this, Mr. Salzano had never been able to return to work because of his heart condition and this, of course, had been superimposed upon pre-existing narrowing and/or hardening of the coronary arteries or heart diseases, which had up to this time been silent, and as a result of this episode, he was considered totally disabled at least by me when I saw him, as well as another physician.

I have continued to examine him up-to-date, as per my reports and find him to be still totally disabled and the actual diagnoses are held, postero-lateral myocardial infarction, with extension.

Pre-existing underlying silent and/or hardening of the coronary arteries or coronary heart disease and he has syndrome due to coronary insufficiency requiring nitroglycerin several times a day for the relief of chest pain.

Q Is the diagnosis you made causally related to the trauma of January 3, 1966?

A Yes.

Q Doctor, is further treatment and observation indicated?

A Yes.

Q And, doctor, could you tell us with a reasonable degree of medical certainty if the condition is permanent?

A Yes.

Q Could you tell us as of what day or date that this

condition would be considered permanent?

A Well, in retrospect, we would have to say that that occurred as of the date of his heart attack, January 3, 1966.

The reasons for this are as follows:

Number one, there has been no other indication for his recovery from his original episode and the subsequent episode in April and there has been no decrease in his symptomology.

It has remained more or less the same, and perhaps, worse at times, and better at times but no permanent or definite improvement and he continues to require the taking of nitroglycerin sublingually several times a day, which means more than several pains a day, but only requires the use of nitroglycerin several times a day and able to walk only one average city block at a slow pace before having to stop for a shortness of breath.

Thus, he is incapable of doing anything requiring transportation, other than a private car.

He cannot use public transportation because of this and he would require a private car to get about.

He is totally disabled insofar as any form of gainful employment is concerned.

He certainly cannot do the work of a longshoreman anymore. He cannot do any work as far as I am concerned.

Q Doctor, I want you to assume that this man is not a

Q Doctor, did he tell you whether or not when you examined in June of 1972, that he was able to perform any work effort at all?

A No.

Q No, he did not tell you, or he was not able to perform?

A I have no record of it.

Q Did you question him about his work activities at that time?

A Yes, and he said that he was not doing any work.

Q If I told you that it was to the contrary and, in fact, that he worked in a lumber yard in the year of 1971, might that have an adverse or modifying effect on your opinion?

MR. GUCCIARDO: Note my objection for the record.

I realize we are taking the doctor out of turn but that is not the factual pattern here.

JUDGE McGRAIL: I will overrule it.

THE WITNESS: If I was told this man had been work and capable of doing work in a lumber yard, physical labor, that would alter my opinion.

MR. MANES: I have no other questions of the doctor.

REDIRECT EXAMINATION

BY MR. GUCCIARDO:

Q Doctor, could an underlying arterial schlerotic heart disease which is progressive remain asymptomatic for the

Claimant's Exhibit 8 (pages 1-6)

UNITED STATES DEPARTMENT OF LABOR

BUREAU OF EMPLOYEES' COMPENSATION

Second Compensation District

In the matter of the claim for compensation under the Longshoremen's and Harbor Workers' Compensation Act.

VINCENT SALZANO,

Employee,

- against -

AMERICAN STEVEDORES, INC.,

Employer,

MICHIGAN MUTUAL LIABILITY COMPANY,

Insurance Carrier.

COMPENSATION ORDER

AWARD OF COMPENSATION

CASE NO. 966-6186

Such investigation in respect to the above entitled claim having been m as is considered necessary, and a hearing having been duly held in conformity law, the Deputy Commissioner makes the following:

FINDINGS OF FACT

1. That on the 3rd day of January 1966, the employee herein was in the e of the employer herein at Brooklyn, in the State of New York, in the Second Co sation District, established pursuant to the provisions of the Longshoremen's Harbor Workers' Compensation Act, and that the liability of the employer for co sation under said Act was insured by Michigan Mutual Liability Company;

2. That on said day the employee was performing services for the employe a marine carpenter aboard a vessel which was afloat upon navigable waters of th United States loading cargo at Pier 1, Brooklyn Army Base, Brooklyn, New York, sustained accidental injury resulting in his disability;

3. That the employee was steadily employed by the employer as well as oth employers as a marine carpenter performing the duties required of his position

of physical handicap or complaint for seventeen years prior to January 3, 1966; that on said day the employee was employed on the main deck; that the cargo being loaded consisted of heavy military equipment which required shoring and bracing; that timber measuring six by eight inches, twelve feet long and weighing approximately one hundred pounds were utilized for that purpose; that the employee reported for work at 8:00 a.m. on that morning and boarded the vessel by means of a gangway; that he was on standby and did no physical labor until 9:00 a.m.; that at that time he commenced placing timbers described above individually and unassisted and carried them on his shoulder a distance of approximately thirty feet to where the cargo was being secured; that at approximately 10:30 a.m., after carrying about eighteen pieces of timber in such fashion, and while in process of carrying another piece of timber he experienced pain in his chest and broke out into a cold sweat; that he so informed his foreman and coworkers but continued carrying two or three more pieces of timber, after which he was compelled to sit and rest due to recurrent chest pains; that he continued to rest until lunch time (about 11:45 a.m.) when he left the ship by means of the gangway; that he consumed a relatively light lunch and was reporting back to work when, while ascending the gangway the chest pain became more severe; that he informed the timekeeper he was going to the International Longshoremen's Association (ILA) Clinic which he did that date; that he reported to the emergency room at the ILA Clinic where he underwent examination which included an electrocardiogram; that he was hospitalized the same day (Long Island College Hospital) and his condition was diagnosed as a posterior lateral myocardial infarction; that he was discharged from the hospital on January 28, 1966; that subsequent thereto he did not perform any remunerative work nor did he engage in any strenuous activities and remained under the care of his physician; that as a result of increased cardiac symptomology he was rehospitalized on April 18, 1966 for a condition as testified to by his treating physician as an extension of the myocardial infarction which occurred on January 3, 1966;

4. That the work performed by the employee on January 3, 1966 (above descr was heavy and strenuous requiring substantial physical effort and stress; that s effort and stress precipitated the myocardial infarction which occurred on that and the subsequent cardiac involvement, which constitutes an accidental injury arising out of and in the course of his employment;

5. That the employee's average weekly wage at the time of injury was $190.

6. That written notice of the injury was not given within thirty days but the employer had knowledge of the injury and has not been prejudiced by lack of s written notice;

7. That the employer is liable under Section 7 of the Act to furnish the employee with medical treatment, etc., for such period as the nature of the injur or the process of recovery may require; that unaware of the compensability of his claim and the relationship of the injury to his employment, the employee did not request the employer for medical treatment pursuant to Section 7(a) of the Act, a instead, sought medical treatment, including hospitalization, elsewhere and the employer and insurance carrier are liable for all medical and hospital expenses incurred as a result of the injury; that said expenses included $1,230.00 represen ing services rendered the employee by his physician from January 3, 1966 to April 1967, inclusive, which amount is considered to be fair and reasonable;

8. That the employee was afflicted with preexisting arteriosclerotic heart disease which did not require medical attention, was asymptomatic and did not prev him from performing his full duties as a marine carpenter and establishing a demon strated earning capacity of $190.42 a week (his average weekly wage) at the time o the injury;

9. That the employee was born October 4, 1930 and was formally educated to t tenth grade high school; that he has been employed as a marine carpenter all his industrial life; that with due regard to the nature and extent of the employee's injuries, his limited educational and indust-

negligible and as a result of the injury of January 3, 1966 he was totally disabled from January 4, 1966 to May 22, 1967, inclusive, on which date he was still so disabled, and he is entitled to 72 weeks compensation at $70.00 a week for such temporary total disability; that the compensation for temporary total disability amounts to $5,040.00;

10. That the employer and insurance carrier have paid nothing to the employee as compensation;

11. That at the last hearing the employee's attorney entered a motion and request that the costs of these formal hearing proceedings in this claim be assessed against the employer and the carrier under Section 26 of the Act for the reason that, in the view of the attorney, these proceedings have been continued by the carrier and employer on frivolous grounds; that Section 26 of the Act states: "If the court having jurisdiction of proceedings in respect of any claim or compensation order determines that the proceedings in respect of such claim or order have been instituted or continued without reasonable ground, the costs of such proceedings shall be assessed against the party who has so instituted or continued such proceedings."; that by letter dated January 26, 1966 the employee's attorney notified the employer and the carrier that the employee had suffered a heart injury for which treatment and compensation under the Act were requested; that on or about March 17, 1966 the employer and carrier filed with the Deputy Commissioner a notice of controversion assigning the following reasons: "No accident. No accident arising out of and in course of employment. No notice. No causal relation. No causally related disability. No medical evidence of causally related disability."; that on July 1, 1966 a physician specializing in cardiology examined the employee on behalf of the employer and carrier and submitted a report of the same date in which he concluded that if the history of carrying the heavy beams at work were confirmed then such incident would be "capable of contributing to the occurrence of a [illegible] coronary occlusion on January 3, 1966"; that on January 6, 1967 at the [illegible] hearing in this claim the

carrier's representative stated that the employer's and carrier's position was "that the claimant did not suffer an accidental injury within the meaning of this statute and further, whatever disability he has suffered since January 3, 1966 is not the result of any injury while employed by American Stevedores Company.", and that the carrier was prepared with its defense of the claim; that at none of the three hearings held in this case did the carrier and employer present testimony or other evidence which would in any way support the stated position; that on reviewing the record at this time there appears lack of information showing the basis of the carrier's controversion of the claim as put forth at the first hearing; that there is lack of information contained in the record to make a determination as to whether or not Section 26 would apply to the circumstances here and before such determination is considered the Deputy Commissioner would require further hearing and also briefs on the legal questions, from the parties; that further there is insufficient information in the record at this time to determine whether the provisions of Section 14(e) apply and if they apply the date that such provisions took effect in this case; that if the claimant desires to have these matters determined request should be made in writing by himself or his attorney to the Deputy Commissioner, after which further hearing on the application of Sections 14(e) and 26 will be had;

Upon the foregoing Findings of Fact the Deputy Commissioner makes the following:

AWARD

That the employer, American Stevedores, Inc., and the insurance carrier, Michigan Mutual Liability Company, shall pay to the employee compensation as follows: 72 weeks at $70.00 a week from January 4, 1966 to May 22, 1967, inclusive, which is $5,040.00 for temporary total disability. The employer and carrier having paid nothing to the employee as compensation, there is due and payable $5,040.00, which amount the employer and insurance carrier are DIRECTED to pay forthwith in one sum, less attorney fees hereinafter provided, and to continue payments in bi-weekly

installments from May 23, 1967 at $70.00 a week during the continuance of such temporary total disability or until otherwise ordered.

A fee in the amount of $2,000.00 is approved in favor of Israel, Adler, Ronca Gucciardo, Esqs., 160 Broadway, New York, New York 10038 for services rendered the claimant in the presentation of his claim and made a lien on the compensation due.

Given under my hand and filed at 321 West 44th Street, New York, N. Y. 10036, this 31st day of May 1967.

Michael J. Collins

Deputy Commissioner
Second Compensation District

PROOF OF SERVICE

I hereby certify that a copy of the foregoing Compensation Order was sent by registered mail to the claimant, his attorneys, the employer and the insurance carrier, at the last known address of each, as follows:

Mr. Vincent Salzano	- 529 11th Street, Brooklyn, New York 11215
Israel, Adler, Ronca & Gucciardo, Esqs.	- 160 Broadway, New York, New York 10038
American Stevedores, Inc.	- 67 Broad Street, New York, N.Y. 10004 - Attn: Warren Green
Michigan Mutual Liability Company	- 100 Church Street, New York, N. Y. 10007

Michael J. Collins

Deputy Commissioner
Second Compensation District

Mailed: May 31, 1967

Carrier's No: 90-CUS-251586

CERTIFICATE OF SERVICE

I hereby certify that on February 19, 1976, I served a copy of the foregoing Brief by mailing copy thereof by certified mail to:

Joseph F. Manes, Esq.
Minore and Manes
11 Park Place
New York, New York 10007

Attorney for petitioners

and to

Angelo C. Gucciardo, Esq.
Israel, Adler, Ronca and Gucciardo
160 Broadway
New York, New York 10038

Attorney for respondent
Vincent Salzano

Francine K Weiss
FRANCINE K. WEISS
Attorney
U.S. Department of Labor